

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

KINDER MORGAN BULK TERMINALS, INC.¹

Employer

and

Case 20-RC-17872

OPERATING ENGINEERS LOCAL UNION NO. 3,
INTERNATIONAL UNION OF OPERATING ENGINEERS,
AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Pursuant of the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The parties stipulated, and I find, that the Employer is a Delaware corporation with an office and place of business in Benecia, California, where it is engaged in the business of handling and transporting petroleum coke products. During the calendar year ending December 31, 2002, the Employer sold goods or services valued in excess of \$50,000 to purchasers located outside the State of California. Based on the parties' stipulation to such facts, it is concluded that the Employer is engaged in

¹ The Employer's name appears as amended at the hearing.

commerce within the meaning of the Act and that it will effectuate the purposes and policies of the Act to assert jurisdiction in this matter.

3. The parties stipulated, and I find, that the Petitioner is a labor organization within the meaning of the Act.

4. The parties stipulated, and I find, that there is no contract bar to the petition herein.

5. The Petitioner seeks to represent a unit comprised of all full-time and regular part-time production and maintenance employees and foremen employed in the Employer's in-plant operation at the Valero Refinery in Benecia, California. The petitioned-for unit consists of nine individuals, including four in-plant operators, four lead in-plant operators and one in-plant day foreman.

The Petitioner and the Employer are currently parties to a collective-bargaining covering employees who work in the Employer's dock operations at the Valero Refinery. The Employer contends that a *Globe*² election should be conducted, giving the petitioned for in-plant employees the choice to either be represented as part of the existing dock employee unit or of not being represented by Petitioner. The Employer also contends that In-Plant Day Foreman, Dennis Clarke, should be excluded from the unit on the basis that he is a statutory supervisor.

For the reasons discussed below, I find that the petitioned-for unit is not an appropriate unit and that the employees should vote as to whether they desire to be

² An *Armour-Globe* election is provided for under Section 1190.1(c)(1) of the Board's Representation Casehandling Manual when a group of unrepresented employees shares a community of interest with represented employees; it allows the unrepresented employees to vote whether they wish to be included in a unit with the represented employees. *Globe Machine & Stamping Co.*, 3 NLRB 294 (1934); *Armour & Co.*, 40 NLRB 1333 (1942).

included in the existing unit of dock employees. I further find that In-plant Day Foreman Clarke is not a statutory supervisor and should be included in the unit.

The Employer's Operations. Valero refines crude oil into various petroleum products at its Benecia facility. One of these products is petroleum coke, which is used in co-generation plants to produce electricity. Under its contract with Valero, the Employer loads and transports petroleum coke on the grounds of the Valero's refinery. On a daily basis, Valero pipes approximately 1,200 tons of coke that is "cracked" or cooked in a coker unit to produce petroleum coke.

There are two parts to the Employers operation at the Valero Refinery: an in-plant operation and a dock operation. Both parts of the Employer's operation are located on the grounds of Valero's refinery and are about two and a half miles apart. At the in-plant operation, the Employer loads petroleum coke into railcars for delivery to Valero's customers or Valero's on-site dock operation; and into trucks for shipment to Valero's customers. At the dock operation, the petroleum coke is unloaded into silos for storage and to await loading onto ships. The Employer's employees at the dock operation also handle the loading of the petroleum coke onto ships about once every six weeks.

Manager Dan Modar is the highest-ranking Employer official at the Valero Refinery. He oversees both the in-plant and dock operations. Modar is salaried and has an office located near the dock silos. Reporting to Modar are In-Plant Day Foreman Dennis Clarke and Dock Operations Day Foreman Jim Holman. Employees in the dock and in-plant operations directly report to their respective day foreman. Although the parties dispute the status of In-Plant Day Foreman Dennis Clarke as a statutory

supervisor, the record reflects that Dock Operations Day Foreman Holman is included in the unit of dock operations employees currently represented by the Petitioner.

The In-Plant Operations. The in-plant operation includes nine employees, including four in-plant operators, four lead in-plant operators and Day Foreman Clarke. The in-plant operation is responsible for loading petroleum coke from two in-plant silos onto trucks and Union Pacific railcars for delivery to Valero's customers and to Valero's dock silos for storage and loading onto ships. The record reflects that there are fourteen railcars used by Valero solely to transport petroleum coke from the in-plant operation to the dock operation.

The in-plant operation runs twenty-four hours a day, seven days a week, including holidays. The in-plant workers have schedules that alternate on a weekly basis between five twelve-hour shifts and two twelve-hour shifts. Normally, on each shift, there is one lead in-plant operator and one in-plant operator. Clarke works an eight-hour shift, Monday through Friday, which ends at approximately 1 p.m.

The in-plant operators and lead in-plant operators are required to have special training and security badges from Valero in order to gain access to their work area. The in-plant workers, other than Clarke, spend about ninety percent of their day loading rail cars and trucks with petroleum coke. Each shift loads between seven and fifteen rail cars and thirty to fifty trucks a day.

To load railcars, the in-plant operator uses controls that operate a coke-loading chute, while the lead in-plant operator operates a piece of equipment, called a track-mobile, to move the railcars directly under the chute. The lead in-plant operator and the in-plant operator communicate by radio during the loading process to ensure that the

railcars are positioned properly. After the railcars are loaded, an engineer, who apparently is not employed by the Employer, uses a track-mobile to pull the railcars the two and a half miles along tracks to the dock operation. When trucks are being loaded, the in-plant operator handles the loading himself and directs truck traffic without assistance from a lead in-plant operator. The in-plant operators also work to control dust dispersion during the loading process.

Both the in-plant operators and lead in-plant operators also perform a number of other functions, including delivering oil or “totes” throughout the refinery; loading sulphur trucks; checking gauges to determine how much coke is in each silo; and performing light maintenance and cleaning. Light maintenance work includes repairing holes in vent lines and pipes, repairing loading chutes, putting new cables on loading chutes, installing new dust covers and changing motors. The in-plant operators and lead in-plant operators also work at the “bag” houses, which are not physically described in the record but which are used to control dust. Major maintenance work, such as replacing the large blower motors, is handled by Valero.

The Dock Operation. As noted above, the Employer’s dock operations consist of five employees, including four dock operators and Dock Foreman Jim Holman, who are covered under the Petitioner’s collective-bargaining agreement with the Employer (herein called the Agreement). The Employer has recognized the Petitioner in this unit since the 1930s. The Agreement covering these employees is effective from July 1, 2002, through June 30, 2005, and includes employees in the following job classifications: heavy-duty repairman, welder, conveyor operator, dozer operator, loader operator, equipment operator, winch operator, locomotive operator, oiler, brakeman and foreman.

The dock operation receives petroleum coke by rail or truck from the upper in-plant silos and unloads it into dock silos for storage prior to ship loading. When the petroleum coke arrives at the dock operation, it is unloaded through a chute into a pressurized tank. In order to do this, the dock operator attaches the loading chute onto the bottom of the rail car; removes a safety pin; opens a valve; and the petroleum coke flows by gravity into a pressurized tank. The dock operator uses a control panel to direct the petroleum coke into a particular silo and to determine which air motors are used for the unloading process. Unloading a train takes about an hour and ten minutes. While the petroleum coke is flowing out of the rail car or truck and into the silo, the dock operator normally performs light maintenance work or just waits for the process to be completed. When the unloading process is completed, an engineer, who, as indicated above, is apparently not employed by the Employer, returns the empty railcars to the in-plant operation.

The dock operation runs twenty hours a day, seven days a week. It is closed between 2 a.m. and 6 a.m. each day. The dock operators work four ten-hour shifts each week and the dock foreman works five eight-hour shifts, Monday through Friday. On every day except Wednesdays, the dock foreman and one dock operator man the day shift. On Wednesdays, two dock operators work on the day shift along with the dock foreman. Usually, only one dock operator works on the night shift.

About once every six weeks, the dock operators spend about thirty hours loading the petroleum coke onto a ship, using a ship loading tower and a conveyor system located near the dock silos. Ship loading usually requires a crew of about two or three people, with one working in the loading tower; another working to control the rate that the coke

goes onto the belts that lead to the loading tower; and another employee working with the railcars or trucks being offloaded. The Employer also usually hires longshoremen to assist in loading a ship, including a linesman crew and a tarping crew to tarp the holds of the ship for dust control.

Interchange. As indicated above, the in-plant operation and the dock operation are both located on Valero property but are about two and a half miles apart. They are connected by rail and by road. The in-plant employees do not work temporarily at the dock operation or vice versa. A security badge from Valero is required in order to work at the location where the in-plant employees work and none of the dock employees have been given such a badge. Lead in-plant operators Michael Cordero and Kevin Stoneburner testified that the only time they go to the dock area is when Modar calls them to come to the office which is located at the dock silo. They also testified that dock employees do not come into their area of the plant.

With regard to permanent interchange, the record shows that because of the higher pay and benefits under the Agreement covering the dock employees, a transfer from the in-plant operation to the dock operation is considered a promotion. Modar testified that the most recent transfer from the in-plant operation to the dock operation occurred about two to three years ago. Three of the five dock employees previously worked as in-plant employees.

The record reflects that employees in the in-plant operation and the dock operation have daily contact by phone and by fax regarding the railcars that are moving between the two operations. The in-plant operators do not park in the same parking lot as the dock operators; they park in a Valero parking lot and the dock

employees park on the street. The two groups have common health and safety training and also separate safety training. As indicated above, on a monthly basis, a single representative of each group meets with Day Foreman Clarke, Dock Foreman Holman and Manager Modar, as part of a safety committee. The two groups of employees do not eat lunch together or take breaks together. However, employees from both groups are invited to an annual Employer Christmas party and other social events held by the Employer.

Functional Integration. The record reflects that the Employer's operation is highly integrated. The employees in the in-plant and dock operation are both part of the same process of transporting petroleum coke at the same facility to fulfill the Employer's subcontract to Valero. Employees in both groups load and/or unload the same petroleum coke using the same railcars that make a circuit between the two parts of the Employer's operation. The in-plant and dock operation have daily communication regarding the petroleum coke traveling between the two parts of the Employer's operation. In effect, the dock operation is a subset of the loading and unloading work provided by the Employer for Valero's product; it handles the unloading and loading for shipment by sea whereas the in-plant operation handles train and truck loading as well as loading the product for the short transport to the dock operation. The dock operation could not function without the in-plant operation.

Skills and Qualifications and Job Functions. The work of the employees in the in-plant and dock operation is quite similar. As indicated above, the in-plant operators and the dock operators both load and/or unload the same petroleum coke. They both operate control panels that direct the petroleum coke during this process. Both must deal with

minimizing dust dispersion. Employees in both groups also gauge the silos, which means that they manually determine the amount of petroleum coke in the silos. To become proficient at dock work takes about a year, but learning to unload railcars only requires about a day to learn. The same basic math and reading skills are required for both jobs. The work of both groups of operators involves the same type of physical labor and they each must fill out similar paperwork as part of their jobs, including coke inventory sheets, equipment check sheets, coke work permits and time sheets.

The in-plant operators must take special safety training from Valero and receive a badge from Valero in order to work in the plant area; while the dock operators take the same training, they are not issued badges by Valero (except for Day Dock Foreman Holman).

Training and Equipment. The initial health and safety training for new in-plant and dock operators is the same and is based on the Valero accident prevention manual. On a monthly basis, the in-plant operators have their own safety meetings conducted by Modar and/or Clarke, which are not attended by the dock operators. There is a joint safety committee that meets on a monthly basis. Modar, Clarke, an in-plant operator and a dock operator attend this meeting. The safety equipment used by employees of both groups is the same and consists of a hard hat, hearing protection equipment, safety glasses, respirators, safety boots and coveralls.

The Employer trains the in-plant operators to load the chutes in about a week. Their training consists of on-the-job training by another employee during that period. Training for dock employees to unload trains takes only about a day but to become proficient in all aspects of the dock operation takes about a year.

Pay Rates & Other Employer Policies. Both in-plant operators and dock operators are paid on a weekly basis. In-plant operators earn \$12.48 an hour and the lead in-plant operators earn \$15.50 an hour. In-Plant Day Foreman Clarke earns \$19.58 an hour. Dock operators earn \$21.50 an hour and Dock Day Foreman Holman earns \$23.50 an hour. The fringe benefits of the two groups differ. Both groups are subject to the same absenteeism policy and operate under common safety rules.

Schedules. As indicated above, the in-plant operation runs around the clock seven days a week while the dock operation is closed four hours each day, from 2 a.m. to 6 a.m. The work schedules of the in-plant operators and dock operators are also different, with the in-plant operators working twelve-hour shifts and the dock operators working ten-hour shifts.

Analysis: Whether the Petitioned-For Unit Is An Appropriate Unit. As indicated above, the Petitioner seeks to represent a separate unit comprised of the Employer's in-plant employees, including In-Plant Day Foreman Clarke, and the Employer takes the position that these employees can only constitute an appropriate unit if they are included with the existing unit of dock employees represented by the Petitioner.

Section 9(b) of the Act provides that the Board "shall decide in each case whether the unit appropriate for the purposes of collective-bargaining shall be the employer unit, craft unit, plant unit, or a subdivision thereof." The test applied by the Board to determine whether employees share a community of interest with other unit employees is whether the employees in both groups have: (1) differences or similarities in wages, compensation and benefits; (2) whether they share common supervision; (3) whether they have similar hours of work; (4) whether they have differences or similarities in their

qualifications, training and job skills; (5) whether their job functions are different or similar; (6) whether they have frequent contact; (7) whether they are functionally integrated and have frequent interchange and contact; and (8) the bargaining history. See *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 151 (1988); *Kalamazoo Paper Box Corp.*, 136 NLRB 134 (1962).

The record herein does not support that the petitioned-for unit is an appropriate unit. Both in-plant and dock employees are supervised by Manager Modar.³ As shown above, the Employer's in-plant and dock operations are functionally highly integrated. The employees in both the in-plant and dock operations perform similar work, loading and unloading the same product at the same facility, so that it may be transported to Valero's customers. The dock operation could not exist without the in-plant operation. There is frequent daily communication between the employees in the two groups by fax and by phone. Three of the five dock operators were formerly in-plant operators and there is plainly a line of progression from position of in-plant to dock operator. An operator from both groups is part of a safety committee that meets each month. While there is no temporary interchange and little face-to-face contact between employees in the two groups, I do not find this dispositive, given the community of interest factors weighing against finding a separate in-plant unit appropriate. Nor do I find that the different working conditions, pay and benefits, resulting from the existence of the Agreement covering the dock employees, warrants a finding that a separate in-plant employee unit is an appropriate unit. Instead, I conclude, based on their common

³ As discussed below, I find that In-Plant Day Foreman Clarke is not a statutory supervisor.

supervision, high level of functional integration, frequent communication, permanent interchange, and similar training and functions, that the in-plant employees should be included in a unit with the dock employees, assuming that they vote to be so included.

Accordingly, I find that the following group of employees of the Employer constitute a voting group which may vote whether or not they wish to be represented by the Petitioner in the existing unit:

All full-time and regular part-time production and maintenance employees and foremen, including in-plant operators, lead in-plant operators and in-plant day foremen, employed at the Employer's operation at the Valero Refinery in Benecia, California; excluding all other employees, sales employees, office clerical employees, professional employees, managerial employees, guards and supervisors as defined in the Act.

Whether Day Foreman Clarke is a Statutory Supervisor. As indicated above, Manager Dan Modar is the highest-ranking Employer official at the Valero Refinery. Modar oversees manpower for both the in-plant and dock operations. Modar is salaried and has an office near the dock silos. Modar meets with Valero representatives and discusses which customer will have priority and he handles all training and workflow issues. On a daily basis, Modar reports to Valero and also to a higher-ranking Employer manager in Oregon. Reporting directly to Modar are In-Plant Day Foreman Dennis Clarke and Dock Day Foreman Jim Holman.

The four in-plant operators and four lead in-plant operators report to Clarke on a daily basis. Clarke is responsible for overseeing the in-plant operation, ensuring that railcars and trucks are loaded properly; acting as a liaison with Valero; troubleshooting any problems that arise; dealing with manpower issues and complaints; and handling all

of the in-plant mechanical training of the in-plant employees. Clarke can establish and re-establish work priorities based on his communications with Valero. For example, he can direct employees to switch from loading railcars to loading trucks or vice versa. In addition, Clarke puts together the schedule for in-plant operators and lead operators, issues permits and does job hazard analyses.

Clarke does not regularly perform loading work like the other in-plant operators and lead in-plant operators. However, approximately twelve to eighteen hours a month, he fills in for absent or vacationing in-plant operators and lead in-plant operators and performs loading work during such times. Clarke also performs maintenance work on equipment as do the other petitioned-for employees. In addition, he performs a number of administrative tasks, dividing his time between his main office at a trailer near the dock silos where Modar's office is located and at his office near the in-plant operation. At the main office, he uses a computer to type up schedules and safety procedures.

Clarke works an eight-hour shift, Monday through Friday, which ends at approximately 1 p.m. As indicated above, the in-plant operators and lead in-plant operators work schedules that alternate on a weekly basis between five twelve-hour shifts and two twelve-hour shifts. The day shift for an in-plant employee runs from 6 a.m. to 6 p.m. The record does not disclose that any other person substitutes for Clarke when he is not at the plant for the approximately five hours of the day shift remaining when his shift ends, during the other twelve hour shift at night or during the weekends. Nor does the record disclose whether employees are instructed to contact Clarke and/or Modar if issues arise when neither of them is at the facility.

Clarke substitutes for Modar with regard to the in-plant operations when Modar is absent or on vacation. According to Modar, when Clarke does so, he assumes all of Modar's authority with regard to the in-plant operation. The record does not disclose how much time Clarke spends substituting for Modar. Clarke has no authority over the dock operation even when Modar is absent.

Clarke's Authority With Regard to Hiring. Modar testified that Clarke has the authority to review job applications, to interview applicants, to make recommendations to Modar, and, in Modar's absence, to hire in-plant operators. According to Modar, Clarke has interviewed about ten to twenty job applicants since Modar became the manager, about half of them without Modar being present. In this regard, Modar testified that he believed that Clarke had participated in the hiring of at least half of the eight lead in-plant operators and in-plant operators currently employed. However, five of the eight in-plant operators and lead in-plant operators currently employed testified that it was Modar and not Clarke who had interviewed them prior to their hire. Modar testified that he generally accepts Modar's hiring recommendations. However, the record does not disclose the identity of any employee who was hired as a result of a recommendation by Clarke.

Clarke's Authority With Regard to Disciplining and Discharging Employees. The record reflects that the Employer has a progressive disciplinary system with steps that include oral warnings, written warnings, suspensions and termination as increasing levels of discipline. Clarke is authorized to give oral warnings to in-plant operators and in-plant lead operators. There is no evidence that any oral warning given by Clarke has resulted in further discipline being administered. Modar testified that Clarke has issued written warning letters to employees for excessive tardiness or safety violations. However,

Modar did not recall any employee warning letter within the past two years that had been signed only by Clarke and not also by Modar. The record contains no warning letters. It does contain corrective action reports signed by Clarke and Modar as discussed below.

Modar testified that on one occasion approximately two years ago, when Clarke was substituting for Modar who was on vacation, Clarke terminated an employee who failed a random drug test. However, according to Modar, Clarke did so after consulting with the Employer's West Coast management. The record reflects that the Employer's policy required the termination and that Clarke had no discretion in the matter. There is no documentation in the record concerning this termination and Modar did not recall who had actually signed the employee's discharge letter.

Modar testified generally that Clarke is responsible for reporting rule infractions by in-plant operators and lead in-plant operators to Modar and for making recommendations as to what corrective action should be taken. According to Modar, there have been occasions when he has accepted Clark's recommendations but he does not always do so. In this regard, the record contains a number of documents entitled, "Corrective Action Reports," that are signed by both Clarke as the "immediate supervisor," and by Modar as the "reviewing supervisor." The record reflects that Clarke reported the incidents to Modar and it was Modar who wrote up the corrective action reports and then gave the reports to Clarke to review for accuracy with regard to the date, time, persons and a description of the incident involved. In each case it was Modar, not Clarke, who met with the employee to discuss the problem(s) set forth in the report. None of the corrective action reports resulted in any personnel action being taken beyond the report and the meeting with Modar.

Specifically, three of the corrective action reports involve in-plant operator Brian Daniels and are signed by Daniels on December 12, 2002, and February 21 and April 2, 2003. In each report, there is a check in the box indicating that a written warning was the corrective action taken. The December 12 report relates a number of incidents involving Daniels that resulted in damage to equipment. It states that future action may include termination. It contains a handwritten notation, apparently by Daniels, stating: "Doesn't apply." The February 21 report relates several incidents involving Daniels, including safety infractions; failure to attend a mandatory meeting; and being late for a shift. It contains the same entry that future action may include termination. The report includes a handwritten notation reading: "No response, except a long discussion. Dan Modar"

The April 2, 2003, corrective action report for Daniels states that the action being taken was "discussions of all concerns of both parties." The document contains a typed entry that on the night shift of March 20, 2003, employees Mark Eckhardt and Brian Daniels failed to inspect or load any commercial rail cars and that Daniels had told Clarke that there was not enough coke to load the cars. The corrective action report states that there was enough coke to load at least some of the cars and that Daniels' explanation did not account for his failure to inspect the cars. The typed notation contains a sentence, which is lined through on the document reading as follows: "Brain [sic] has continued to have a bad attitude that affects his performance and safety." With regard to this lined-through entry, Modar testified that he made this change after meeting with Daniels to discuss the written warning. The typed entry states that Daniels needs to develop a better attitude, higher performance standards and do everything in his power to work safer and that "this is the third time that I had to answer to Valero for Brian's poor

performance.” The typed entry further states that: “Notice that further action will be taken without prior notice if and when the problem worsens, continues, or recurs. Up to and including termination.” There is also a handwritten entry as follows: “We discussed the problems, but Brian did not have a written response. Dan Modar”

With regard to the corrective action reports on Daniels, Modar testified that he did not recall Clarke making any recommendation with regard to the disciplinary action for the incidents involved in the December 12 and February 21 reports, but that for the April 2 report, Clarke had recommended that Daniels be terminated and Modar had not followed this recommendation.

The record also contains two corrective action reports for in-plant operator William Johnson, signed by Johnson on March 13 and May 27, 2003. Both are checked as written warnings and signed by Clarke as the immediate supervisor and by Modar as the reviewing supervisor. The March 13 report relates the Employer’s inability to reach Johnson by phone or radio on March 10 and 13, and states that this problem was witnessed by Day Foreman Clarke and Lead Operator Michael Cordero. It contains a typed entry: “If there are any further infractions in the near future, William will be terminated. Dan Modar (Manager).” There is an unsigned handwritten entry stating “William had no comments after our discussion.” The May 27 report relates a speeding incident for which Valero issued a citation. It states that “William shall be terminated for any further safety violations.” It includes a handwritten entry by Johnson stating that he was in a hurry to ask the truck driver the weight of his truck because the scales were broken. Modar testified that he did not recall Clarke making any recommendation regarding the incidents involved in the March 13 report. With regard to the May 27

report, Modar testified that Clarke had recommended a written warning and that the Employer talk to Johnson about his radio communications with Valero and Employer personnel, and that the corrective action report had been issued and Modar had discussed the matter with Johnson.

Modar testified that in cases where a severe safety violation has been committed by an employee, Clarke has independent authority to send the employee home and has done so at least twice in the past couple of years. The record does not disclose any specific evidence as to such incidents or the employees involved. Modar testified that Clarke confers with him prior to sending anyone home when Modar is available.

Modar and other employee witnesses testified that all operators and lead operators are required to write up incident reports. Lead In-plant Operator Kevin Stoneburner testified that these include incidents involving property damage or personal injury or a situation where either came close to occurring. According to Stoneburner, as a lead in-plant operator, he also issues informal oral warnings to other in-plant operators.

In-Plant Lead Operators Michael Cordero, Kevin Stoneburner and Robert Rapolla and In-plant Operators Brian Daniels and Fred Haley testified that Clarke has told them that he has no authority to hire and fire employees. Rapolla, who had been employed by the Employer for seventeen months, testified that when he told Clarke that another employee was a “poor worker,” Clarke responded that he did not “have the power to do anything about it, . . . talk to Dan [Modar].” As indicated above, Clarke has given oral warnings to in-plant employees but there is no evidence that these warnings have ever lead to any other personnel actions being taken.

Clarke's Authority Regarding Scheduling, Vacation, Days Off, Overtime and Calling In Replacement Employees. Modar testified that Clarke has full authority over scheduling and manpower issues involving the in-plant operation and does not need Modar's approval to schedule employees or decide whether employees get vacation time or personal/unpaid time off. According to Modar, Clarke is only required to inform Modar of whatever action Clarke has taken. However, Modar also testified that Clarke prepares a monthly and weekly schedule and turns them into Modar in advance. At the time Clarke submits the weekly schedule to Modar, Clarke informs Modar if he plans to call in additional in-plant operators during the next week, and Modar obtains clearance for the schedule from Valero.

With regard to the monthly schedule, the record shows that the in-plant employees work on established shifts that rotate between five twelve-hour days one week and two twelve-hour days the next week. On a monthly basis, the in-plant employees also rotate between night and day shifts on an alternating basis. Modar testified that the shift schedule remains the same except for special projects and vacation leave.

In-plant operators and in-plant lead operators turn their vacation requests in to Clarke who generally notifies them later the same day if the request is granted. Modar testified that vacation is granted on a first-come, first-serve basis. Lead In-plant Operators Michael Cordero and Kevin Stoneburner testified that it is Modar whose signature appears on employee vacation request forms. The record contains no vacation forms.

Modar testified that overtime work is sporadic and that sometimes months go by without overtime being needed. However, he testified that in the two months prior to the

hearing, overtime work was performed every week because there were big maintenance projects to be done. The record does not indicate how Clarke determines who will perform overtime work. However, the record shows that the Employer has no relief in-plant operators or relief lead in-plant operators and that it is the nine in-plant employees who must fill in when their co-workers are absent or on vacation or when additional work is necessary. Modar testified that in cases when an in-plant employee does not show up for work, Clarke has the authority to authorize the employee working on the shift to work overtime until a replacement employee arrives and to call in a replacement for the absent employee. However, both Modar and other employee witnesses also testified that in such situations, employees do not need to obtain anyone's permission to stay and work overtime when the employee on the next shift fails to show up because the Employer must have coverage for the shift. Employees also call in their own replacements from a list of their regular co-workers without obtaining prior authorization, merely notifying Clarke that they have done so.

Clarke's Timekeeping Duties. The in-plant operators and lead in-plant operators clock in and out at the Valero security gate. They also fill out daily timecards and timesheets for the Employer. Clarke is responsible for filling out the payroll documents on a weekly basis and ensuring that the clocked times are consistent with what is on the employee's timesheets.

Clarke's Authority Regarding Promotions and Pay Increases. Modar testified that he has no control over pay rates, which are set by the Employer's West Coast management. Lead In-plant Operator Kevin Stoneburner testified that he was promoted to a lead position after working as an operator for one year and that it was Modar who

told him he had been promoted. According to Stoneburner, Modar did not tell him why he was chosen for the promotion. Lead In-plant Operator Rapolla testified that he was promoted from an in-plant operator to lead in-plant operator position and that both Clarke and Modar had informed him he had been given the promotion. Rapolla testified that he had assumed that the lead position came with tenure and experience in the job and that he was the next “in line” for the job. There is no evidence that any employee has ever been promoted to the lead position based on Clarke’s recommendation.

Evidence Regarding Clarke’s Other Authority, Duties and Working Conditions.

Modar testified generally that Clarke has the authority to write checks and pay bills. However, the record does not contain any further evidence concerning his authority in this regard. The record reflects that Clarke has access to employee personnel files and that other employees do not have such access. He also has an office near the dock silos and one near the in-plant operation. In this regard, other in-plant employees also have desks. In-Plant Operator Daniels identified Clarke as his “boss,” and testified that Clarke would speak to him if he did something wrong and that Daniels would inform Clarke if something went wrong. However, the employees who testified also testified that Clarke had told them that he had no authority to hire or fire employees. Clarke does not have any budgeting responsibilities. Clarke is paid an hourly wage and earns \$19.58 an hour. Modar is paid a salary.

Analysis. As indicated above, the Employer contends that Day Foreman Dennis Clarke should be excluded from the unit on the basis that he is a statutory supervisor.

Section 2(11) of the Act defines a supervisor as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) is interpreted in the disjunctive and the possession of any one of the authorities listed places the employee invested with this authority in the supervisory class. See *Providence Hospital*, 320 NLRB 717 (1996) enf'd 121 F.3d 548 (9th Cir. 1997).

To support a finding of supervisory status, an employee must possess at least one of the indicia of supervisory authority set out in Section 2(11) of the Act. *International Center for Integrative Studies*, 297 NLRB 601 (1990); *Juniper Industries, Inc.*, 311 NLRB 109, 110 (1993). Further, the authority must be exercised with independent judgment on behalf of the employer and not in a routine, clerical or perfunctory manner. *Clark Machine Corp.*, 308 NLRB 555 (1992); *Bowne of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). An individual who exercises some “supervisory authority” only in a routine, clerical, perfunctory, or sporadic manner will not be found to be a supervisor. *Id.* Further, in determining whether an individual is a supervisor, the Board has a duty to employees not to construe supervisory status too broadly because the employee who is found to be a supervisor is denied the employee rights that are protected under the Act. *Hydro Conduit Corp.*, 254 NLRB 433, 347 (1981). Secondary indicia alone, such as job titles, differences in pay and attendance at meetings, are insufficient to establish that an

employee is a statutory supervisor. *Laborers Local 341 v. NLRB*, supra; *Arizona Public Service Co. v. NLRB*, 453 F.2d 228, 231 fn. 6 (9th Cir. 1971); *Waterbed World*, 286 NLRB 425, 426 (1987).

Whether an individual is a supervisor is to be determined in light of the individual's actual authority, responsibility, and relationship to management. See *Phillips v. Kennedy*, 542 F.2d 52, 55 (8th Cir. 1976). Thus, the Act requires "evidence of actual supervisory authority visibly demonstrated by tangible examples to establish the existence of such authority." *Oil Workers v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971). It is well established that mere conclusory statements, without such supporting evidence, are not sufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Although a supervisor may have "potential powers . . . theoretical or paper power will not suffice. Tables of organization and job descriptions to do not vest powers." *Oil Workers v. NLRB*, 445 F.2d at 243. In addition, the evidence must show that the alleged supervisor knew of his or her authority to exercise such power. *NLRB v. Tio Pepe, Inc.*, 629 F.2d 964, 969 (4th Cir. 1980).

Finally, the burden of proving supervisory status is on the party who asserts that it exists. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *California Beverage Co.*, 283 NLRB 328 (1987); *Tucson Gas & Electric Company*, 241 NLRB 181 (1979).

The record does not establish that Clarke is a statutory supervisor. Thus, the record shows that Modar works on-site and is closely involved with all hiring and disciplinary decisions and that to the extent Clarke makes recommendations in these areas, they are not necessarily followed by Modar in making his decisions. Although Clarke's signature appears on corrective action reports, Clarke's function in disciplinary

matters appears to be primarily to report what happened to Modar. While he may sometimes make recommendations, Modar testified that he does not always follow them. Thus, it is Modar who writes up the disciplinary warning, personally meets with the employee to discuss the problem, and who decides what, if any, disciplinary action to take.

I do not find that Clarke's authority to send employees home without pay in instances where severe safety violations have occurred or his ability to give employees oral warnings that do not result in further adverse personnel actions is sufficient to warrant a finding that he possesses or exercises the authority of a statutory supervisor.

Nor do I find that Clarke's scheduling authority is sufficient to warrant a finding that he is a statutory supervisor. Thus, with regard to vacations, the record shows that these are granted on a first-come, first-serve basis so that any role Clarke has with regard to them appears to be a routine administrative function that does not require the use of independent judgment. Similarly, with regard to Clarke's role in setting the work schedule, the record shows that the hours of work are set and the schedule rotates in an established manner. With regard to overtime, the record discloses that employees can work overtime in hold-over situations when an employee on the next shift does not show up and that they do so without obtaining prior authorization. Indeed, the employees find their own replacements and merely notify Clarke what they are doing. The record does not show specifically how other overtime work is assigned so I cannot reach the conclusion that Clarke is a statutory supervisor based on general testimony in this regard by Modar. Nor can I find that Clarke is a statutory supervisor based only on Modar's

general testimony that Clarke can grant unpaid time off to employees for personal reasons, when the record contains no tangible evidence to support such testimony.

Nor does the record show that Clarke has any authority with regard to promotions or decisions regarding the granting of pay increases to employees.

In these circumstances, I do not find that Clarke is a statutory supervisor and he will be included in the unit.

DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the voting group found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by **OPERATING ENGINEERS LOCAL UNION NO. 3, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO.** The date, time and place of the election will be specified in the Notice of Election that the Board's Regional Office will issue subsequent to this Decision.

If a majority of the valid ballots are cast for the Petitioner, the employees will be deemed to have indicated the desire to be included in the existing unit currently represented by the Petitioner, and the Petitioner may bargain for those employees as part of the unit. If a majority of the valid ballots are cast against representation, the employees will be deemed to have indicated the desire to remain unrepresented. In that event, a certification of results will be issued.

VOTING ELIGIBILITY

Eligible to vote in the election are those in the voting group who were employed during the payroll period ending immediately before the date of this Decision, including

employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Voting group employees in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

LIST OF VOTERS

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, 3 copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large

type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.).

In order to be timely filed, the list must be received in the Regional Office, located at 901 Market Street, Suite 400, San Francisco, California 94103-1735, on or before July 10, 2003. No extension of time to file this list will be granted, except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed.

NOTICE OF POSTING OBLIGATION

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of three (3) full working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least five (5) full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so precludes employers from filing objections based on non-posting of the election notice.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570.

This request must be received by the Board in Washington by 5 p.m., EDT, on July 17,

2003. The request may not be filed by facsimile transmission.

Dated at San Francisco, California, this 3rd day of July, 2003.

Robert H. Miller, Regional Director
National Labor Relations Board
Region 20
901 Market Street, Suite 400
San Francisco, California 94103-1735

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